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OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

**DEPARTMENT OF
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May 12, 2004

Christa M. Proper
Vice President
Richmond Connections Inc.
d/b/a Richmond NetWorx
124 Fenn Street
Pittsfield, MA 01201

RE: Petition by Richmond Connections Inc. d/b/a Richmond NetWorx
D.T.E. 03-45

Dear Ms. Proper:

On March 5, 2003, Richmond Connections d/b/a Richmond NetWorx ("Richmond NetWorx") filed a petition ("Petition") requesting that the Department of Telecommunications and Energy ("Department") institute a proceeding to investigate the establishment of a Universal Service Fund ("USF") for the Commonwealth of Massachusetts. According to the Petition, Richmond NetWorx is a small competitive local exchange carrier ("CLEC") operating in Berkshire County, and filed the Petition as a result of new, higher rural unbundled network element ("UNE") loop rates, which it asserts will make it economically infeasible for Richmond NetWorx to continue doing business in rural areas. Accordingly, Richmond seeks an instate USF to provide funding to CLECs that face a price squeeze caused by deaveraged UNE rates and statewide averaged retail rates.

Richmond NetWorx states that it is a facilities-based CLEC that serves customers in Berkshire County over its own network, as well as by leasing UNEs from Verizon and by resale (Petition at 2). Richmond argues that it has found that it cannot offer competitively-priced UNE-based services in rural Massachusetts and still cover its internal costs plus the costs of Verizon's charges (*id.*). According to Richmond NetWorx, Verizon's UNE rural loop

rates, especially the proposed rates (now final) filed pursuant to D.T.E. 01-20,¹ are significantly higher than the retail rates that Verizon charges residential customers in rural areas of Massachusetts (*id.*). Richmond NetWorx concludes that it is necessary to establish a USF fund in Massachusetts to encourage competition in the rural areas of the state (*id.*).

In response to the Petition, the Department opened docket D.T.E. 03-45 for the sole purpose of soliciting comments from registered carriers. The Hearing Officer Notice in D.T.E. 03-45 requested comments on two issues: (1) whether the Department has sufficient statutory authority under existing federal and state statutes to establish a USF for the Commonwealth; and (2) if so, whether the Department should initiate an investigation into the establishment of a USF for the Commonwealth. Initial comments were filed by Richmond NetWorx; Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon"); Verizon Wireless; PAETEC Communications Inc. ("PAETEC"); Sprint Communications Company L.P. ("Sprint"); Richmond Telephone Company ("Richmond Telephone"); and AT&T Communications of New England, Inc. ("AT&T"). Reply comments were submitted by Richmond NetWorx; Verizon; Sprint; AT&T; AT&T Wireless; and T-Mobile USA, Inc. ("T-Mobile"). After reviewing the comments, an information request was issued to Richmond NetWorx and AT&T seeking supporting information regarding costs and revenues.² Richmond NetWorx filed its response to DTE-1-1 on August 21, and AT&T filed its response to DTE 1-1 on August 25, 2003.

In comments received, commenters disagreed on whether the Department has sufficient authority under existing federal and state statutes to establish an instate USF in Massachusetts. Richmond NetWorx and other CLECs argue that the Department has sufficient statutory authority to establish an instate USF, either explicitly from the Telecommunications Act of 1996 ("Act"),³ or from the Department's general supervisory authority⁴ (Richmond NetWorx Comments at 3-8; AT&T Comments at 3-10, 7; PAETEC Comments at 2; Richmond Telephone Comments at 1-3; Sprint Comments at 2-3). On the other hand, Verizon and the wireless carriers argue that the Act does not give independent authority to the Department to require carriers to contribute to an instate USF, and that the Department does not have

¹ UNE Rate Case, D.T.E. 01-20 (2002). The new UNE rural loop rates became effective July 16, 2003.

² In response to the information request, AT&T provided monthly UNE-P per line costs compared with monthly revenues, as well as a gross margin percent. Richmond NetWorx provided a comparison between Verizon's wholesale rates and Verizon's retail rates, which identified a higher wholesale cost in the rural zone than retail rates in that same zone.

³ 47 U.S.C. §§ 253(b) and 254(f).

⁴ G.L. c. 159, §§ 12, 14 and 20.

authority under Massachusetts law to establish an instate USF (Verizon Comments at 1-6; Verizon Reply Comments at 2-3; Verizon Wireless Comments at 2-6; AT&T Wireless Comments at 1-2; T-Mobile Reply Comments at 3).

Regarding the question of whether the Department should initiate an investigation into the establishment of an instate USF for the Commonwealth, commenters were split on this question. Richmond NetWorx, AT&T and Richmond Telephone all urge the Department to open an investigation (Richmond NetWorx Comments at 8-9; Richmond NetWorx Reply Comments at 6-10; AT&T Comments at 9-13; Richmond Telephone Comments at 3). In particular, Richmond NetWorx argues that an investigation is necessary to allow the Department to gather evidence regarding the alleged price squeeze to see if further Department action is necessary, and provide economic support for its request (Richmond NetWorx Reply Comments at 6). While AT&T did present information on the effect of rural UNE rates on its per line gross margins, AT&T and Richmond Telephone focused on access charge reform as a reason to initiate an investigation into establishment on an instate USF (AT&T Comments at 9-13; AT&T Reply Comments at 9-11; Richmond Telephone Comments at 3-6).

Verizon, Sprint, PAETEC, and the wireless carriers all oppose a formal investigation into the establishment of an instate USF, although for different reasons. Verizon argues that Richmond NetWorx has not demonstrated that there is any problem in any area of Massachusetts with affordability or availability of telecommunications services that need to be addressed through an instate USF, and disputes Richmond NetWorx's price squeeze claim (Verizon Comments at 6-8; Verizon Reply Comments at 3-6). Sprint argues that the Department should obtain explicit statutory authority from the Legislature before attempting to establish an instate USF (Sprint Comments at 4). PAETEC urges the Department to allow market forces to provide the remedy sought by Richmond NetWorx (PAETEC Comments at 2-5). The wireless carriers argue that Richmond NetWorx failed to demonstrate the need for an instate USF; but if the Department does institute an instate USF, it should exempt wireless carriers (Verizon Wireless Comments at 6-7; AT&T Wireless Reply Comments at 2-3; T-Mobile Reply Comments at 2-3).

After reviewing the comments received, the Department finds that Richmond NetWorx and other commenters have demonstrated a strong case in favor of the Department initiating an investigation to determine, through record evidence, whether there is a need for a universal service funding mechanism, and if so, the appropriate type of USF. For example, the information submitted by the carriers about a price squeeze in the rural density zone appears sufficient to warrant an investigation into the establishment of an instate USF. If an investigation reveals the need for an instate USF, the Department would then explore possible contribution methodologies as well as determine which telecommunications providers will be required to contribute.

Prior to initiating an investigation into an instate USF, however, the Department seeks to ensure that it has sufficient statutory authority to implement the results of such an investigation. While the commenters have argued that the Department has not only explicit federal authority to establish an instate USF, 47 U.S.C. § 254(f), but also implicit state authority to do so, G.L. c. 159, §§ 12, 14, and 20, the existence of adequate authority is the subject of disagreement in the industry (see comments, above). Therefore, the Department concludes that the better approach is to seek explicit state authority from the General Court prior to proceeding with a formal investigation. Such an approach is prudent because it forecloses potential legal challenges to an instate USF based on jurisdictional reasons. The Department determines that the likelihood of such a challenge is high; and resolving potential jurisdictional challenges to the legitimacy of the instate USF could greatly encumber the Department's investigation. In addition, an investigation into an instate USF will likely consume extensive Department (as well as industry) resources, and the Department is reluctant to proceed absent explicit statutory authority. It is preferable to establish the Department's authority first, and investigate the need for an instate USF after receiving the Legislature's grant of authority. Therefore, the Department declines to open an investigation into an instate USF at this time.

The Department will seek authorization to file legislation establishing explicit statutory authority to establish an instate USF. Once the Department obtains that explicit authority, the Department will open an investigation to determine whether a need exists for an instate USF, and if so, the form of that USF.⁵

⁵ As mentioned above, the D.T.E. 03-45 docket was opened only to solicit comments on whether the Department should proceed with a formal investigation into the need for an instate USF, and is not an adjudicatory proceeding. Thus, the question of need for the instate USF will still have to be proven in the subsequent adjudicatory investigation, and if so proven, the Department will have to determine what type of USF mechanism will meet that need.

Accordingly, the Department hereby denies Richmond NetWorx's request to initiate an investigation into an instate USF at this time.

Sincerely,

_____/s/_____
Paul G. Afonso, Chairman

_____/s/_____
James Connelly, Commissioner

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Eugene J. Sullivan, Jr., Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner